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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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9 KLINTON MICHAEL KING,

No. C-12-5140 TEH (PR)

10 Petitioner,

ORDER DENYING PETITIONER'S
SECOND REQUEST FOR APPOINTMENT
OF COUNSEL; GRANTING PETITIONER
ADDITIONAL TIME TO FILE
OPPOSITION OR MOTION FOR A STAY

11 v.

12 L.S. McEWEN, Warden,

13 Respondent.

Doc. #13

14 _____/

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16 On October 3, 2012, Petitioner filed this pro se petition
17 for a writ of habeas corpus. On the same day, Petitioner requested
18 appointment of counsel to assist him in preparing his traverse.
19 Doc. #3. On November 6, 2012, the Court denied this request and
20 issued an order for Respondent to show cause (OSC) why a writ of
21 habeas corpus should not be granted. Doc. ##4, 5. In the OSC, the
22 Court indicated that, in lieu of an answer, Respondent may file a
23 motion to dismiss on procedural grounds and, if Respondent filed
24 such a motion, Petitioner had thirty days in which to file an
25 opposition. Doc. #4 at 4.

26 On April 8, 2013, Respondent filed a motion to dismiss the
27 petition for failure to exhaust state court remedies. Petitioner's
28 opposition was due thirty days later, or by May 8, 2013. Petitioner

Petitioner's second request for appointment of counsel is DENIED for the same reasons stated in the Court's November 6, 2012 Order. The Sixth Amendment right to counsel does not apply in habeas corpus actions. Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir. 1986). The district court may appoint counsel to represent a habeas petitioner if "the court determines that the interests of justice so require . . ." 18 U.S.C. § 3006A(a)(2)(B). Unless an evidentiary hearing is required, the decision to appoint counsel is within the discretion of the district court. Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984); Rule 8(c), 28 U.S.C. foll. § 2254. The fact that Respondent has filed a motion to dismiss based upon lack of exhaustion does not change the fact that, at this stage of the proceedings, appointment of counsel is not warranted.

I

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are first required to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek

1 to raise in federal court. See 28 U.S.C. § 2254(b), (c); Rose v.
2 Lundy, 455 U.S. 509, 515-16 (1982); Duckworth v. Serrano, 454 U.S.
3 1, 3 (1981). The state's highest court must be given an opportunity
4 to rule on the claims even if review is discretionary. See
5 O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (petitioner must
6 invoke "one complete round of the State's established appellate
7 review process.").

8 Therefore, contrary to what Petitioner indicates his
9 attorney told him, he must present all of his federal habeas claims
10 to the California Supreme Court before they may be reviewed by a
11 federal district court. If Petitioner agrees with Respondent, that
12 he has only presented claim three to the California Supreme Court,
13 then he may either proceed in this Court on his one exhausted claim
14 and dismiss his unexhausted claims, or he may file a motion to stay
15 and abey his federal petition while he exhausts his unexhausted
16 claims in state court.

17 There are two kinds of stays available in a habeas action:
18 the Rhines stay and the King/Kelly stay.¹ A stay under Rhines v.
19 Weber, 544 U.S. 269 (2005), "is only appropriate when the district
20 court determines there was good cause for the petitioner's failure
21 to exhaust his claims first in state court," the claims are not
22 meritless, and there are no intentionally dilatory litigation
23 tactics by the petitioner. Id. at 277-78. Any such stay must be
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25 ¹Litigants and courts often refer to the procedure as a "stay and
26 abeyance." The phrase refers to the district court "stay[ing] the
27 petition and hold[ing] it in abeyance while the petitioner returns to
28 state court to exhaust." Rhines v. Weber, 544 U.S. 269, 275 (2005).
For convenience, the court refers to the combined procedure as a stay.

The King/Kelly stay is the second kind of stay and is an alternative method to deal with a petitioner who has some unexhausted claims he wants to present in his federal habeas action. Under the procedure outlined in Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007), "(1) a petitioner amends his petition to delete any unexhausted claims; (2) the court stays and holds in abeyance the amended, fully exhausted petition, allowing the petitioner the opportunity to proceed to state court to exhaust the deleted claims; and (3) the petitioner later amends his petition and re-attaches the newly-exhausted claims to the original petition." King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009) (citing Kelly, 315 F.3d at 1070-71). A petitioner seeking to avail himself of the Kelly three-step procedure is not required to show good cause as under Rhines, but rather must eventually show that the amendment of any newly exhausted claims back into the petition satisfies both Mayle v. Felix, 545 U.S. 644, 659 (2005), by sharing a "common core of operative facts" and Duncan v. Walker, 533 U.S. 167 (2001), by complying with the statute of limitations. Id. at 1141-43.

II


In the interest of justice, the Court grants Petitioner additional time in which to file his opposition to Respondent's motion to dismiss. Petitioner must file an opposition twenty-eight (28) days from the date of this Order. If Petitioner determines that he has not exhausted all of his claims, instead of an opposition, he may file a motion to stay and abey his petition, as

1 outlined above, or indicate to the Court that he wishes to dismiss
2 his unexhausted claims and to proceed only on his exhausted claim.

3 Respondent has fifteen days from the date of Petitioner's
4 filing to file a reply to the motion to dismiss or an opposition to
5 a motion to stay and abey.

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7 IT IS SO ORDERED.

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9 DATED 06/12/2013



THELTON E. HENDERSON
United States District Judge

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